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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALTER RANKIN,

Petitioner,

V.

ARDITH MCPHERSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE LEGAL FOUNDATION OF AMERICA, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-eight times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Legal Foundation of America (LFA), is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

The National District Attorneys Association, Inc. (NDAA) is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Fourteenth Amendment.

SUMMARY OF ARGUMENT

An utterance having only private shock value, which does not advance debate on any issue, is not speech on a "matter of public concern" within the meaning of *Connick v. Myers*, 461 U.S. 138 (1983). Particularly when it takes place while an employee is on duty and performing tasks required by her employment, and while other employees are present as a captive audience, an utterance of this kind is of much greater concern to the employer. Amici recognize that employees in law enforcement offices have rights that are protected under the first amendment, and that these rights include protection of some kinds of speech that may criticize or embarrass their employers. However, employers should not be required to retain employees whom any private employer would terminate for job-related reasons. If they were required to do so, law enforcement employees actually would have a kind of "super first amendment status," which in effect is what Respondent claims for them. Finally, the fact that this employee was not a law enforcement officer herself should not prevent the employer from applying employment policies that he would apply uniformly throughout the office. There are many different kinds of civilian employees who have widely differing kinds of responsibilities in the law enforcement effort, and a police chief should not be reduced to guessing which ones—dispatchers, community relations personnel, evidence technicians, or persons with McPherson's precise duties—are constitutionally privileged to advocate murder while on the job.

ARGUMENT AND AUTHORITIES

THE EMPLOYEE'S ON-DUTY STATEMENT IN THIS CASE, ADVOCATING THE CRIME OF MURDER, WAS NOT THE KIND OF EXPRESSION ON A MATTER OF "PUBLIC CONCERN" THAT WOULD OVERCOME THE LEGITIMATE CONCERNS OF HER EMPLOYER IN A LAW-ENFORCEMENT OFFICE.

The court of appeals correctly recognized that *Connick v. Myers*, 461 U.S. 138 (1983) provides the framework for analysis of this case. Furthermore, that court correctly held: "We . . . agree that Constable Rankin's action in dismissing McPherson was based on an important and legitimate government interest." 786 F.2d at 1238. However, the court incorrectly held that her advocacy of the crime of murder, even though in the form of "an actual wish for . . . assassination", was "addressed to serious matters of public concern." *Id.*

A. Statements That Merely Have Private Shock Value, and That Have No Possibility of Advancing Discussion of Any Public Issue Whatsoever, Cannot Be Characterized as Expression on "Matters of Public Concern".

McPherson's statement contributed nothing to any public debate on any issue. Indeed, it was deliberately phrased to have nothing to do with any public debate. It certainly could not have been calculated to persuade anyone concerning any issue, public or private. To frame the question in the terminology of *Connick v. Myers*, amici submit that "Publication of [McPherson's] remark would provide no basis for determining [any person's] qualifications for continuing in public office." *Connick v. Myers*, 461 U.S. at 1690; *Pickering v. Board of Education*, 391 U.S. 571-72 (1968).

The only possible motivation for this statement was to give vent to anger. That is a private purpose,[1] not a "serious matter

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1 In a private context, speech may serve many purposes. For public purposes, "It has been urged that an important function of free speech is to enhance the potential of individual contribution to the social welfare." *See* Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593 (1982). In some contexts, amusement, introspection, or even completely noncommunicative cursing (short of obscenity or "fighting words") might serve *private* purposes that could be considered to be within the broad protection of "speech." However, the *Connick* framework does not consider these *private* purposes, because employers obviously should not be required to consider them in the work environment.

of public concern." Furthermore, a law enforcement office is the last place on earth where actions or utterances produced solely by uncontrolled temper should be encouraged. Law enforcement employees simply must be able to avoid lashing out at persons who frustrate them, who may range from arrested persons to courtroom litigants to public officials.[2] The remark in this case served the same private purpose for the speaker as verbal abuse of an arrestee would.

The decisions of this court clearly indicate that remarks having merely private shock value cannot appropriately be labeled as "serious matters of public concern." For example, in *Bethel School District v. Fraser*, 54 U.S.L.W. 5054 (U.S. S. Ct. Mar. 3, 1986), the court held that an offensive speech, inconsistent with the mission of the institution, was not protected speech when given by a high school student at a school assembly. That was so, even though the student mentioned a candidate for office, and even though his speech might have been protected as dealing with "public concern" if he had not chosen to abandon that purpose and, instead, merely shock and offend.

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2 Furthermore, the fact that an employee lashes out at an individual, whether a public or private figure, does not convert her remarks into "matters of public concern." "It does not follow . . . that [the employee's] statement can be characterized as speech on a matter of public concern just because such a concern provided the impetus for speaking." *Yoggerst v. Hedges*, 739 F.2d 293 (7th. Cir. 1984). The truth of the matter is that most frustrations that prompt angry utterances by individuals involve issues that other individuals somehow also recognize, and thus sufficiently tortuous reasoning could link almost any such utterance to a "public" issue in some remote way. For example, a jailer who verbally abuses a prisoner can claim that his behavior is somehow related to bad working conditions. A governor's aide who shouts obscenities, waves his arms, and disrupts a legislative meeting, might say that frustration with other individuals' positions on public issues is the cause of his remarks. But surely these individuals could not avoid discipline on these grounds. The court of appeals' effort to distinguish *Yoggerst v. Hedges*, *supra*, in this case is completely unpersuasive.

In its opinion in *Fraser*, the Court also quoted the Manual of Parliamentary Practice drafted by Thomas Jefferson and adopted by the House of Representatives, prohibiting the use of "impertinent" speech during debate.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the court dealt with the power of the Federal Communications Commission to regulate a radio broadcast in which a comedian described his own performance as being in "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say ever." *Id.* at 729. Although public discussion of the practices, customs, and morals exhibited in contemporary radio broadcasting clearly would be protected by the first amendment, the plurality of the Court held that the "dirty words" spoken in that case were not. Its opinion said: "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." These words (which fit the present case perfectly) were quoted from *Chaplinsky v. New Hampshire*, 355 U.S. 568, 572 (1942), which held that "insulting or 'fighting' words" are not expressions on serious matters of public concern. *Cf. New York v. Ferber*, 458 U.S. 747 (1982); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (carving out "personal abuse" as unprotected) (by implication). Finally, in *Cohen v. California*, 403 U.S. 15 (1971), a sharply divided court upheld the right to express an anti-draft viewpoint in a public place in terms highly offensive to most citizens, but indicated that a different context (and, more importantly, a narrowly drawn statute, since *Cohen* was a criminal case) would make a difference. This case involves that different context, in that it involves the work environment and is subject to *Connick-Pickering* considerations.

B. A Statement Made By a Law Enforcement Employee During Working Time, Made to a Captive Audience While the Employee is on Duty and Performing Tasks Required By the Employment, is of Greater Concern to the Law Enforcement Employer Than an Off-Duty Statement.

Police officers have rights of association, too. This right has a first-amendment dimension.[3] Furthermore, the right to speak includes the right not to listen. Constable Rankin was entitled to consider the fact that employees in his office are a captive audience for other employees, with whom they work side by side. The lower court recognized the "important and legitimate government interest" in "Constable Rankin's contention that he should not have to employ *anyone* who 'rides with the cops and cheers for the robbers' ",[4] 786 F.2d at 1238. What the court of appeals failed to recognize was that all personnel in the

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3 Obviously, the police officer's associational rights are limited. The officer would have no cognizable right to avoid association with members of the public, arrestees, or numerous others whom their employment required, merely because he or she might prefer not to deal with a given individual. But officers clearly have an interest in not being saddled with fellow officers or employees who deliberately shock and disgust them, such as those who "cheer for the r bers." An employer like Constable Rankin has a right to consider this interest, and he should be able to consider that it has first amendment dimensions.

4 Constables in Texas (and many other states) are constitutional law enforcement officers. Tex. Const. art. V sec. 18. Their duties are similar to those of a sheriff: to "make arrests" with or without warrants, "to execute and return according to law all process", and to perform other duties of a peace officer. 52 Tex. Jur. 2d, *Sheriffs, Constables and Marshals* secs. 1-2 (1964). The arrest powers of a constable or deputy extend throughout the State of Texas. *Id. See also* Tex. Code Crim. Proc. Ann. art. 2.12 (Vernon Supp. 1986) (constables are peace officers with authority similar to that of sheriffs, city police officers, Texas Rangers, and like persons).

Constables in Harris County, Texas (where this case arose) vary from precinct to precinct in their precise duties. In some locations, they furnish traditional patrol service, much as a metropolitan police force would do; they are the police force for those areas. Furthermore, their authority as peace officers is important in every precinct when they perform such duties as arresting suspects, evicting persons (which can be a dangerous task), seizing property to satisfy judgments (again, often a surprisingly dangerous task), taking persons into custody on mental health warrants, and detaining juveniles. Furthermore, "It is the duty of every peace officer to preserve the peace . . . ", Tex. Code Crim. Proc. art. 2.13 (Vernon Supp. 1986), and deputy constables have this duty even outside normal working

office, from Constable Rankin on down, had a *first amendment* interest to that effect. *See also Bethel School District v. Fraser, supra* (teenage girl students had a valid interest in avoiding treatment as captive audience during speech that, "[b]y glorifying male sexuality, . . . was acutely insulting"); *Erzoznik v. Jacksonville*, 422 U.S. 205 (1975) (rights of listener become particularly important when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure"); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (bus riders can be protected from involuntary exposure to political advertising); *Kovacks v. Cooper*, 336 U.S. 77 (1949) (freedom of speech protects efforts to reach the minds of "willing listeners"; "[t]o enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself"); Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 Colum. L. Rev. 960 (1953).

Furthermore, Constable Rankin had a legitimate interest in the effects of an employee's remarks that denied the most basic purposes of his office, made for anyone to hear, particularly because it occurred during working hours and while the employee was on duty. In this regard, the lower court seriously misapprehended the issue. Perhaps the most uncareful statement by the court of appeals is its conclusion that "the evidence did not show that the remark threatened the future efficiency or morale of the office." 786 F.2d at 1238. The court of appeals ignored the reality that the projection of leadership, atmosphere, and tone of a law enforcement office are crucially important, although they may be difficult for a court of appeals to measure.

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hours, as do other peace officers. They are trained, commissioned, and required to carry firearms. The court of appeals' description of the nature of their duties as peace officers is unduly restrictive.

Although McPherson was not herself a commissioned officer with badge and firearm, her duties were intertwined with these kinds of functions in a way that made the proper discharge of commissioned constables' duties dependent upon the performance of those in her work area. *See* Part D of this brief, below. However, the Court's decision should not depend upon nice distinctions in the duties of this particular employee or this particular office in any event, for the reasons stated in Part D.

It is fortunate that this court has avoided the court of appeals' analysis of this "work environment" issue. In *Bethel School District v. Fraser, supra,* for example, the Court said:

> The first amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. . . . Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the people that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.

Similarly, Constable Rankin's office had proper authority to disassociate itself from the utterances that would contradict its "basic . . . mission" in this case.

But there is something even more fundamentally wrong with the court of appeals' finding that there was no "disruption caused by [McPherson's] comment" and that the remark did not "[threaten] the future efficiency or morale of the office." 786 F.2d at 1238. A more perceptive analysis is given by Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention,* 59 Texas L. Rev. 477, 479-98 (1981):

> The judiciary cannot know the extent to which any kind of distraction during the course of the day interferes with learning. A court can observe that fist fights did not break out and that no one complained about being prevented from doing his work. But the court cannot begin to know even the amount of distraction that actually occurred, either in the students' minds or beyond their awareness. . . . The lack of knowledge about what really enables people to learn and about the complex interrelationship of the variables involved prevents courts

> from judging that no interference has taken place in the school. . . .

A more important concern in the law enforcement setting is the effect such an utterance may have on the discipline of law enforcement employees generally, not simply on the immediate situation. As Justice Powell explained in his separate opinion in *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974):

> [T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency.

It is not necessary for an "employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Perry Education Ass'n v. Perry Local Educators' Assn.*, 460 U.S. 37, 52 (1983).

In this regard, amici are proud that the modern law enforcement ideal—and in the overwhelming majority of cases, the actual practice—is courtesy toward those who provoke personal frustration, including the most repugnant arrested citizen. This court can take judicial notice, based upon widespread news reports, of the professionalism that New York City detectives displayed when they arrested David Berkowitz (who designated himself as the "Son of Sam"), or that displayed by Houston police officers who dealt with mass torture-murderer Elmer Wayne Henley. While recognizing that the record is not perfect, amici emphatically submit that these examples of professionalism do not happen by accident. They happen because officers such as Constable Rankin promptly, habitually, and systematically

reject behavior such as McPherson's. By taking away their ability to do so, the court of appeals' opinion would decrease that professionalism if it were upheld.

C. *While Law Enforcement Employees Clearly Have the Protection of the First Amendment, They Do Not Have the Kind of "Super First Amendment Status" That Respondent in Effect Claims For Them.*

Amici agree with this court's view, expressed in *Pickering v. Board of Education*, 391 U.S. 563 (1968), that a public employee is free to voice criticism against his employer. Law enforcement personnel are also privileged to raise criticism. In Illinois, for example, one appellate court upheld a firefighter's right publicly to accuse the mayor of stealing an election. *Shewmake v. Board of Fire & Police Commrs*, 390 N.E.2d 536 (Ill. App. 1979). In another case, an Illinois appellate court upheld another firefighter who called an alderman a "dummy" in connection with a public issue. *Hasenstab v. Board of Fire & Police Commrs*, 389 N.E.2d 588 (Ill. App. 1979). Another picturesque (but unreported) case involved a Houston city employee who wrote a published letter referring to Mayor Louie Welch as "screwy Louie", was disciplined, and sued. He later accepted the city's offer of settlement.

Conversely, the courts have declined to extend first amendment protection to police officers and other public employees who, in a manner connected with their public duties, utter loud threats, *Watt v. Civil Service Board*, 606 S.W.2d 274 (Tenn. 1980), or use profanity, *Marshall v. City of Atlanta*, 614 F. Supp. 581 (N.D.J. 1984); *Ware v. Sayad*, 676 S.W.2d 258 (Mo. App. 1984).

The more than 20,000 police chiefs, sheriffs, and elected constables in this country expect that subordinates sometimes will exercise their first amendment rights in ways that embarrass or humiliate the administration, their superiors, and fellow officers. That kind of speech is protected. But these officers do not expect and will not tolerate subordinates who, while on

duty, cheerfully support or encourage the commission of violent crimes. Amici concede that a public employee can lawfully undermine morale when offering protected criticism. Amici suggest, however, that a law enforcement employee cannot lawfully undermine morale when, during working hours and on the job, speaking to other employees who must work beside her, she expresses a desire that a person should be murdered.

Ironically, an employee in a purely private business (one without the difficult public mission of a law enforcement office) obviously could be fired for behavior such as McPherson's. Amici expect that ACLU and McPherson will argue for affirmance on the stated ground that law enforcement employees have first amendment rights, an issue no one debates. In reality, however, ACLU's argument is that these employees have a kind of "super first amendment status": even in situations in which any private employer would dismiss the employee, based upon job-related concerns raised by her on-duty behavior, law enforcement agencies would be prohibited from using that sensible response. Again ironically, what ACLU actually argues for is lower performance standards for law enforcement employees. Persons who promptly would be disciplined for their harmful on-duty behavior in private employment may engage in precisely the same harmful on-duty behavior merely because they are law enforcement employees, even though employment-related reasons exist for their termination. The court should reject this "super first amendment status" advocated by McPherson and ACLU.

D. The Fact That the Employee in This Case Was Not, Herself, a Law Enforcement Officer Should Not Exempt Her From Reasonable Policies Generally Applicable in the Law Enforcement Office in which She Worked.

Civilian personnel often work in law enforcement offices. Often, their duties are fungible with those sometimes performed by the officers. Non-officer employees may include evidence technicians, laboratory personnel, radio dispatchers, clerk-typists, booking personnel, receptionists, victim-witness personnel, and persons fulfilling many other kinds of duties. It simply

would not be practical to subject police chiefs to constitutional damage actions depending upon finely-graded distinctions among these innumerable different types of civilian personnel, and to require the chiefs to guess which ones are subject to which constitutionally imposed policies. Constable Rankin should not be saddled with a constitutional responsibility to guess which categories of employees are constitutionally privileged to advocate murder while on the job.

In the first place, it is impossible to compartmentalize a given functionary so that he or she has no influence on law enforcement activities. If McPherson may perform her civil process job in the manner disclosed here, why not protect advocacy of murder by a radio dispatcher? Must Constable Rankin retain a radio dispatcher who "dispatches for the cops, but cheers for the criminals'"? In the second place, a civilian employee like McPherson has great influence in the way that the rights and interests of citizens are protected. McPherson's responsibilities could determine records concerning whether citizens have warrants out for their arrests, or whether they are subject to eviction, or whether their civil papers have been served. Must citizens who deal with non-officer employees on these matters involuntarily hear a speech advocating criminal conduct? Finally, the court of appeals' opinion fails to recognize that police chiefs are like any other kind of employer in that they wish for, and deserve, the kind of employees they will want to retain and promote. They hire persons in McPherson's position whom they will promote to supervisory positions after service of five, ten or twenty years. They hope to see these employees having positive influence on other employees.

Of course, these responsible, positive employees are initially hired as probationary employees, in positions where their responsibility for public contact is minimal. The court of appeals failed to recognize that McPherson was likely to have limited responsibilities, which should be expected to expand. The court of appeals' reasoning would condemn law enforcement officers to retain precisely those employees who showed the least promise of serving the public well in important law enforcement capacities—and, in fact, even to promote such individuals as

McPherson on a "nondiscriminatory" basis, as obviously would be necessary, if her conduct, here, is considered to be protected by the first amendment.

CONCLUSION

The decision of the court of appeals should be reversed.[5]

Respectfully submitted,

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5 Amici express appreciation for the assistance of law student Jack Gillis in the preparation of this brief.